

1 Los Angeles, California, Plaintiffs will, and hereby do, move in Limine, as set forth
2 in Plaintiffs' Motion in Limine No. 5 (Daubert Motion) to exclude opinions of
3 Defendants' Police Practices Expert Edward T. Flosi.
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5 The parties timely met and conferred as required by the Court. This Motion
6 is based on the attached Plaintiffs' Memorandum of Points and Authorities,
7 Declaration of Kent M. Henderson and the Exhibit Nos. 1-4 and a [Proposed] Order
8 thereon is lodged concurrently herewith.
9

10 DATED: September 18, 2018
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12 **GUIZAR, HENDERSON & CARRAZCO, LLP**
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14 /S/ Kent M. Henderson

15 By: _____
16 Kent M. Henderson
17 Attorneys for Plaintiffs
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MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENSE POLICE PRACTICES EXPERT EDWARD FLOSI IMPROPERLY: 1. GIVES LEGAL CONCLUSION OPINIONS AND USES A STANDARD CONTRARY TO LAW; 2. EXPRESSES OPINIONS THAT HE IS UNQUALIFIED TO GIVE AND THAT ARE NOT BASED ON REASONABLY ACCEPTED SCIENCE UNDER DAUBERT AND 3. OFFERS OPINIONS THAT ARE CUMMULATIVE AND MUST BE EXCLUDED

A. Mr. Flosi Gives Improper Legal Opinions and Uses a Standard Contrary to Law Which Opinions Must Be Excluded

Defendants have disclosed a police practices expert, Edward Flosi (hereinafter, “Flosi”) and a ballistics expert, Rocky Edwards (hereinafter, “Edwards”). Mr. Flosi wrote a rambling 48-page report.

Mr. Flosi gives legal opinions that are to be left for the Jury Instructions. His opinions are contrary to the law and will confuse and mislead the Jury on the legal standard. See FRE 403. Ninth Circuit Jury Instruction 9.25 regarding excessive force states, in pertinent part: “Under the Fourth Amendment, a police officer may use only such force as is "objectively reasonable" under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer’s subjective intent or motive is not relevant to your inquiry.” (Jury Instruction 9.25, emphasis added). The 9.25 Jury instruction is based on several cases, most notably Graham v. Connor, 490 U.S. 386 (1989). It is apparent in the instruction that the “from the perspective of the reasonable officer” is the point of view not the “belief” or “perception.” That is why the very next sentence references the “facts known to the officer” (not his “perception” or his “belief”) and then emphasizes that an officer’s subjective intent or motive is not relevant to your inquiry.”

1 In his report, Flosi incorrectly uses the subjective perception and intent of
2 Defendant Medina for all of his opinions. Flosi uses the word “objective” now and
3 again but his opinions are just a re-telling of the supposed subjective “perception”
4 of the Defendant shooter Officer Medina.

5 FRE 403 provides that “the court may exclude relevant evidence if its
6 probative value is substantially outweighed by a danger of one or more of the
7 following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
8 wasting time, or needlessly presenting cumulative evidence.” Mr. Flosi’s
9 “perception” and “belief” opinions will confuse the issues and mislead the jury and
10 should be excluded. (FRE 403, emphasis added).

11 Mr. Flosi’s report at Exhibit No. 1 has been highlighted. At page 32, he uses
12 “perception” of the officer over and over. The correct standard is an objective
13 standard, not a standard of “perception.” It is the facts, not an officer’s “belief.”
14 The objective standard is what the facts really were by examination of all of the
15 evidence not just an adoption of the “perception” of the officer. Flosi just adopts
16 the “perception” of the officer as his version of the facts upon which he bases his
17 opinion which is turning an objective standard into a subjective one. Flosi states
18 “...it also important to note the perception is individual to each officer... .”
19 (Exhibit No. 1, page 32). This is completely contrary to Graham and just “an
20 officer’s subjective intent or motive” which is not relevant under the Jury
21 Instruction. Flosi isn’t supposed to be giving legal opinions to begin with but, here,
22 he is improperly giving legal opinions and the opinions are contrary to the law.
23 When Flosi states “the perception is individual to each officer” it is obvious that he
24 is not using an “objective” reasonable officer standard, he is using an improper
25 subjective officer standard. This is also an improper legal conclusion.

26 Flosi does this again on pages 34-35 of his report, where instead of analyzing
27 the facts of what was actually happening during the event, he simply adopts the
28 speculation and subjective intent of Defendant Medina based on no facts. Flosi
writes that Medina felt Romero “may have been positioned immediately around the

corner.” (Exhibit No. 1, page 34). This statement is based on no objective facts. Flosi then springboards from this to a conclusion that because Medina “believed” that Romero was immediately around the corner and so Medina had to go around the corner and shoot Romero. (Exhibit No. 1, page 35). Flosi adopts something Medina “believed” which was false-- Romero had already thrown away the gun and he was not “immediately” around the corner he was 58 feet down the sidewalk, completely unarmed with his hands empty. Flosi then takes the untrue subjective intent and belief of Medina and reaches a conclusion that the use of force was reasonable. This is really just having an “expert” say the use of force is reasonable because the shooter Defendant “believed” and “perceived” that he was in danger. This is an improper legal conclusion and it is contrary to the “objectively reasonable” standard of Graham. The Court should exclude Mr. Flosi from giving these “officer Belief” and Officer perception” opinions. Mr. Flosi sometimes uses the words “objectively reasonable” but in reality his opinions are a contrary improper legal opinion. Mr. Flosi’s opinion is that an officer’s “perception” or “belief” that he is in imminent danger means he is in imminent danger, no matter what the objective facts are, which is contrary to the law, is in itself a legal opinion and would justify any shooting even if it weren’t objectively reasonable. All of this must be excluded under FRE 403 as confusing the issues and misleading the jury. (See [Proposed] Order.

B. Mr. Flosi Expresses Opinions he is Unqualified to Give, Are Not Based on Accepted Science under Daubert and Should be Excluded from Testifying

Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 508 U.S. 579, 589-91 (1993) (hereinafter, sometimes simply referred to as "Daubert.") Mr. Flosi casts a wide net and is extremely flexible and is not qualified to opine in many of the areas he expresses opinions. Mr. Flosi engages in the “correlation is causation fallacy” and otherwise relies upon junk science in areas that he has no qualifications to express opinions. The “Force Science Institute” studies Mr. Flosi relies on have been debunked, and his perception reaction opinions should not be given by Mr.

1 Flosi.

2 Mr. Flosi is not an expert in human factors. He has no degree in human
3 factors engineering. Mr. Flosi attended an eight- hour training session with the
4 "Force Science Institute" and then a 40- hour class at the same place. (See Exhibit
5 No. 1, page 7). The Force Science "Institute" is not an "Institute" and has nothing
6 to do with "science." It is a group of former police officers and a man named
7 William Lewinski who has a degree from an unrecognized institution in a discipline
8 he made up himself (he "designed" his own degree).

9 FRE 702 deals with testimony by expert witnesses. "Under Rule 702, relevant
10 expert testimony is admissible only if the trial court finds that: (1) the expert is
11 qualified to testify about the matters he intends to address; (2) the methodology
12 used by the expert to reach his conclusions is sufficiently reliable; and (3) the
13 expert's testimony will assist the trier of fact, through the application of scientific,
14 technical, or specialized expertise, to understand the evidence or determine a fact in
15 issue." Huss v. Gayden, 571 F.3d 442, 458-460 (5th. Cir. 2009) (citations therein
16 omitted). Daubert v. Merrell Dow Pharmaceuticals, Inc., 508 U.S. 579, 589-91
17 (1993), the U.S. Supreme Court established a standard for the admissibility of
18 scientific, technical or medical expert opinion or evidence. Mr Flosi is unqualified
19 as a human factors (perception reaction time) expert and as a biomechanical (bullet
trajectory analysis) expert under FRE 702 (1).

20 In Kumho Tire Co., Ltd. v. Carmichael 526 U.S. 137, 149-150 (1999), The
21 U.S. Supreme Court summarized the Daubert factors regarding the admissibility of
22 scientific or technical evidence as follows:

23 "-- Whether a "theory or technique . . . can be (and has been) tested";
24 -- Whether it "has been subjected to peer review and publication";
25 -- Whether, in respect to a particular technique, there is a high "known or
26 potential rate of error" and whether there are "standards controlling the
27 technique's operation"; and
28

1 -- Whether the theory or technique enjoys "'general acceptance' " within a
 2 "'relevant scientific community.'" [Kumho Tire supra, at 149-150, citing
 3 Daubert at 509 U.S., 592-594].

4 Here, the opinion offered by Flosi in the areas of human factors (perception
 5 reaction and biomechanical meet none of these criteria).

6 Daubert is based on an interpretation of FRE Rule 702 and applies to all
 7 experts, thus including scientists as well as those whose opinions are based on skill,
 8 experience, or technical or specialized knowledge (.e.g. physicians, economists,
 9 engineers, perfume testers, tire failure analysts, etc.). (See also Brooks v. American
 10 Broadcasting Cos., Inc. 999 F.2d 167, 173 (9th Cir. 1993); Cavallo v. Star
 11 Enterprise 100 F.3d 1150, 1157 (4th Cir. 1996); Munoz v. Orr 200 F.3d 291, 301(5th
 12 Cir. 2000); General Elec. Co. v. Joiner 522 U.S. 136, 146 (1997); Kumho Tire Co.,
 13 Ltd. v. Carmichael 526 U.S. 137, 149 (1999); Padillas v Stork Gamco, Inc. 186
 14 F.3d 412, 417 (3rd Cir. 1999); In re Paoli R.R. Yard PCB Litig. 916 F.2d 829, 853
 15 (3rd Cir. 1990)).

16 Under Daubert, the reasoning or methodology underlying the testimony of an
 17 expert must be scientifically valid. See Daubert, 509 U.S. at 593-94 and In re
 18 Accutane Prods. Liab., 511 F. Supp. 2d 1288, 1297-1300 (2007). Correlation or
 19 "association" is not causation and Mr. Flosi makes this prohibited mistake over and
 20 over in his un-expert baseless human factor and biomechanical opinions. See also,
 21 Huss v. Gayden, 571 F.3d 442, 458-460 (5th Cir. 2009); and Bowers v. Norfolk S.
 22 Corp., 537 F. Supp. 2d 1343, 1355-1360 (M.D. GA 2007).

23 The Force Science Institute "publishes" articles in police magazines like "The
 24 Police Marksman" (not a peer reviewed human factors engineering journal) and the
 25 articles basically encourage police officers to shoot persons even when they see no
 26 weapon. Mr. Lewinski's conclusions were summarized by the New York Times:
 27 "His conclusions are consistent: The officer acted appropriately, even when
 28 shooting an unarmed person. Even when shooting someone in the back. Even when
 witness testimony, forensic evidence or video footage contradicts the officer's

1 story.” (See New York Times story at Exhibit No. 2). The Force Science Institute
 2 videotapes shooting simulations with no control groups, often using police officers
 3 as “experiment” subjects (who have built in subject bias). To use a legal phrase:
 4 the whole thing is a ridiculous joke. This is junk science at its worst: no scientific
 5 method, no double-blind studies, test taker bias, no peer review and Mr. Flosi has
 6 no other basis for such perception reaction time opinions or other human factors
 7 opinions.

8 Lisa Fournier, Ph.D. a Professor who is in the Department of Psychology at
 9 Washington State University in The Attention, Perception & Performance Lab,
 10 long ago debunked the junk science theories of William Lewinski. (See Exhibit
 11 Nos. 3 and 4). Mr. Flosi does not even claim to be a human factors expert and he is
 12 right, he isn’t. However, Flosi gives all sorts of human factor opinions which
 13 should be excluded. Mr. Flosi’s perception reaction opinions that he calls “The
 14 Reactionary Gap” should be excluded. (These opinions are at pages 37-38 of
 15 Exhibit No. 1 under the heading “Pace of the Event” [compare these baseless
 16 opinions to the paper by Professor Fournier and one can see the Flosi opinions
 17 violate Daubert).

18 Mr. Flosi is not also not a biomechanical expert. He has no degree or other
 19 training in biomechanical engineering and yet he gives bullet trajectory analysis
 20 opinions that he has no qualifications to give and Flosi should be excluded from
 21 giving such opinions at trial. (See Exhibit No. 1, page 39 and the [Proposed]
 22 Order).

23 **C. Mr. Flosi Gives Opinions that are Cumulative of Defendants’ other**
 24 **“Expert” Rocky Edwards and/or Others**

25 Defendants’ other expert Rocky Edwards is proffered by Defendants as a
 26 “ballistics” expert. Without conceding that Mr. Edwards is so qualified, Flosi gives
 27 opinions that are cumulative of Edwards and other “experts” or he simply parrots
 28 the opinions of others which is improper. See FRE 702 (these are not Mr. Flosi’s
 opinions, they are just him re-stating others opinions). Flosi gives opinions on the

1 testing of the gun that are really the opinions of others and/or are ballistics opinions
2 that violate hearsay and FRE 702. (Exhibit No. 1, pages 33-34). The opinions set
3 forth in the [Proposed] Order should be excluded.

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5 DATED: September 18, 2018

6 **GUIZAR, HENDERSON & CARRAZCO, LLP**

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8 /S/ Kent M. Henderson

9 By: _____
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11 Attorneys for Plaintiffs
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